ATTORNEY FOR APPELLANTS:

SARAH L. NAGY
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL L. ROGERS
Rogers & Belding
North Vernon, Indiana

IN THE
COURT OF APPEALS OF INDIANA

PHILLIP & TINA DOTY,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 40A01-0604-JV-148
	)	
JENNINGS COUNTY DIVISION OF FAMILY / CHILD,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0507-JT-113

October 4, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Phillip and Tina Doty appeal the involuntary termination of their parental rights as to their son, D.D. The Dotys raise the following restated issues for review:

1. Was sufficient evidence presented to support the termination of their parental rights?

2. Were their fundamental due process rights violated?

We affirm.

The facts most favorable to the judgment reveal that Tina has a history of drug dependency and related mental health disorders. Phillip, on the other hand, is an alcoholic and has anger control issues. Two months after the Dotys' rights were involuntarily terminated with respect to their son P.D.,[1] Tina gave birth to D.D. on May 29, 2004. D.D. was born addicted to Methadone[2] and spent his first two months of life in the neonatal intensive care unit at St. Vincent Hospital in Indianapolis. During this time, the hospital provided the Dotys with a nearby hotel room so that they could travel from North Vernon to visit with D.D. on the weekends. Despite staying in the hotel room, the Dotys rarely visited with D.D. and had little or no contact with the infant's treating physicians. The hospital social workers and doctors expressed concerns to the Jennings County Office of Family and Children[3] (the OFC) about the ability of the parents to care for a special needs child like D.D.[4]

---

[1] The Dotys' parental rights with respect to P.D. (born January 3, 2002) were terminated on March 31, 2004. On January 31, 2005, this court affirmed the termination order in an unpublished memorandum decision. *In re P.D.*, No. 40A01-0407-JV-281.

[2] In addition to Methadone, Tina also tested positive for marijuana at the time of delivery.

[3] The agency is now the Jennings County Department of Child Services.

D.D. was subsequently adjudicated a child in need of services (CHINS) and was placed directly into foster care upon his release from the hospital on July 28, 2004. He has since remained in the care of the same foster family. During the CHINS proceedings, the OFC attempted to provide the Dotys with services including among other things drug screens, supervised visitation, transportation for visitations, homemaker services, and counseling. As in the case with P.D., the Dotys displayed a record of noncompliance with service providers. For example, their home was so cluttered and dirty that visitation appointments could never be held at their home. Further, offering a variety of excuses, they failed to attend the majority of visitations scheduled with D.D. They consistently refused drug screens[5] and paid only about 10% of the court-ordered support for D.D. Tina routinely missed her therapy appointments, which were eventually terminated by the service provider due to her noncompliance. Phillip also made threats, apparently while intoxicated, against a judge and an OFC case manager involved in P.D.'s termination case, which resulted in two class D felony convictions for intimidation in June 2005.

On July 15, 2005, the OFC filed a petition to terminate the Dotys' parental rights. At the termination hearing on March 8, 2006, Nancy Schoenbein, the OFC supervisor, testified that termination was in D.D.'s best interest, explaining: "I have dealt with them

---

[4] As a result of withdrawal symptoms, the infant cried inconsolably, needed to be held often, and could not sleep for extended periods of time. Other effects of being born addicted to drugs arose later, including developmental delays, high pain tolerance, head banging, and epilepsy. It is also believed that D.D. will have considerable behavior problems. In sum, D.D. needs constant supervision.

[5] The record reveals that Tina submitted to one preliminary drug screen at a therapy session on January 19, 2005. She tested positive for "methamphetamine, pot, and benzoids." *Transcript* at 18. As a result, she was directed to go straight to the hospital and obtain another screen, but she failed to go to the hospital for two days.

since 2002, December, 2002, with two children and I have seen basically no change in all of those years in their parenting, their attendance with either child on visitation, their compliances with service, their addressing their both addictions and their psychological issues." *Id*. at 27. Schoenbein further opined that continuation of the parent-child relationship would pose a threat to D.D.'s well-being and that the Dotys could not care for D.D. properly, especially considering his "extreme needs."[6] *Id*. at 37.

Phil Henry, D.D.'s court appointed special advocate (CASA), similarly recommended termination of the Dotys' parental rights. In a report dated January 12, 2006, CASA noted the Dotys' pattern of not accepting services and indicated that their progress had been minimal to none. At the conclusion of a report dated November16, 2005, CASA provided the following summary and recommendations:

> The [OFC] has demonstrated the willingness and has put forth more than reasonable efforts to work with [the Dotys] with the goal being to re-unify their family. An appropriate level of services was offered and a CASA was assigned to this case from the beginning. [The Dotys] have either been unwilling or unable to participate in services for various reasons ranging from canceling services due to having to go out of town for their dog's illness, getting medicine, or to not attending visitations for several weeks due to hiding out from the police. The inactions on the part of [the Dotys] to accept services has made reunification with [D.D.] impossible.
>
> [D.D.] has been (sic) never been in the home of his parents since birth. He has been with a foster family since his release from the hospital. In the

---

[6] Schoenbein explained:

> [H]e's a child with lots and lots of problems. He takes expensive therapy from first steps. He's at the doctor continually. He's got all kinds of problems from born (sic) addicted to the drugs…. [Tina and Phillip] won't get out of bed till noon. She can't follow through with the simplest thing for herself. How would she do it with a child with all of these needs? She won't go to counseling. She won't address her drug issues. She won't address her emotional issues.

Id. at 37.

> foster home, [D.D.] is being well taken care of, he is receiving appropriate services and medical attention to help him with his needs and is in a safe environment in which he is progressing. [The Dotys] have made no significant changes in their 1 ½ years involvement with the [OFC] and have continued to put their needs above those of [D.D.'s]. Adoption by the foster parents should be the permanency plan for D.D.
>
> The following recommendations are in the best interest of the child:
>
> 1. Termination of Parental Rights should be granted[.]
> 2. [D.D.] should remain a CHINS and continue to reside in foster care.
> 3. Upon Termination of Parental Rights, an adoption should be pursued in a timely manner.

Appellants' Appendix at 16.

On March 13, 2006, the trial court issued an order terminating the parental rights of Phillip and Tina Doty as to D.D. The Dotys now appeal.

1.

The Dotys claim that the evidence is not sufficient to support the involuntary termination of their parent-child relationship with D.D. They specifically contest the trial court's findings that termination is in D.D.'s best interest and that there is a reasonable probability that the conditions that led to D.D.'s removal and placement outside their home will not be remedied.

While parents have a traditional right, protected by the Fourteenth Amendment of the United States Constitution, to establish a home and raise their children, the interests of parents are not absolute and must be subordinated to the children's best interests. *In re D.D.*, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied.* Courts can order the involuntary termination of parental rights when parents are unable or unwilling to meet

their parental responsibilities. *Id.* The goal in terminating parental rights is not to punish parents but to protect children. *Id.*

When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005). We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. We will not set aside a trial court's order to terminate parental rights unless it is clearly erroneous. *In re A.H.*, 832 N.E.2d 563 (Ind. Ct. App. 2005).

I.C. § 31-35-2-4(b)(2) (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006) provides that a petition to terminate a parent-child relationship involving a CHINS must allege that:

> (A) one (1) of the following exists:
>
> > (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> >
> > (ii) a court has entered a finding under Ind. Code § 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
> >
> > (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
>
> (B) there is a reasonable probability that:
>
> > (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

The State is required to establish these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232 (Ind. 1992). "Clear and convincing evidence need not reveal that 'the continued custody of the parents is wholly inadequate for the child's very survival.'" *Bester v. Lake County Office of Family & Children*, 839 N.E.2d at 148 (quoting *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d at 1233). Rather, clear and convincing evidence that the child's emotional and physical development are threatened is sufficient to establish that termination is in the child's best interests. *See Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143.

Here, as set forth above, the Dotys challenge the trial court's findings only with regard to I.C. § 31-35-2-4(b)(2)(B)(i) and (b)(2)(C). In other words, they do not challenge whether: 1) D.D. has been removed for a sufficient period of time; 2) continuation of the parent-child relationship poses a threat to D.D.'s well-being; or, 3) there is a satisfactory plan for the care and treatment of D.D.

Turning first to I.C. § 31-35-2-4(b)(2)(B), we observe that the statute is written in the disjunctive. Thus, as acknowledged by the Dotys, the statute requires the trial court to find only one of the two requirements of subparagraph (B) by clear and convincing evidence. *See In re L.V.N.*, 799 N.E.2d 63 (Ind. Ct. App. 2003). Here, the trial court

found that the continuation of the parent-child relationship posed a threat to D.D.'s well-being, and the Dotys do not challenge this finding. Standing alone, this finding satisfied the requirements of subparagraph (B).

Nevertheless, we further observe that there is abundant evidence in the record to support the trial court's determination that a reasonable probability existed that the conditions resulting in the removal of the D.D. were unlikely to be remedied. In determining whether the conditions that led to a child's placement outside the parents' home will likely be remedied, the trial court should assess the parents' ability to care for the child as of the date of the termination proceeding and take into account any evidence of changed conditions. *See In re A.H.*, 832 N.E.2d 563; *In re K.S.*, 750 N.E.2d 832 (Ind. Ct. App. 2001). The trial court must also evaluate the parents' habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *In re A.H.*, 832 N.E.2d 563. In the instant case, as well as in the case involving P.D., the Dotys have consistently rebuffed efforts by service providers to assist in reunification. They have made little or no progress despite being offered a "plethora of services".[7] *Appellant's Brief* at 5. In sum, they have demonstrated a pattern of putting themselves before their children and have failed, in this case, to demonstrate a commitment to D.D.

---

[7] While acknowledging the OFC provided many services to Tina, the Dotys claim she was not treated for her underlying mental health issues. The record reveals that Tina's mental health issues were related to her drug addiction and that she was referred to a clinical psychologist at Quinco to address her addiction issues, provide a psychological diagnosis, and provide the OFC with guidance regarding treatment and services. Tina was terminated from treatment at Quinco for noncompliance after failing to attend three appointments for psychological testing and failing to follow through with required drug screens.

The Dotys also assert that the evidence was insufficient to show that termination of their parental rights was in D.D.'s best interests. They do not support this assertion, however, with any cogent argument. Rather, they seem to imply that the OFC was required to show that their custody of D.D. would be wholly inadequate for his very survival. Our Supreme Court, however, has made clear that this is not the standard. *See Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143; *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232. Rather, to establish that termination is in the child's best interests it is sufficient to show that the child's emotional and physical development are threatened. *See Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143.

Here, the OFC caseworker and the CASA both indicated that termination was in the best interest of D.D. As the caseworker explained, D.D. is a special needs child with many medical and behavioral issues. The evidence reveals that the Dotys do not have, and have done nothing to obtain, the ability to properly and safely care for a child with such "extreme needs" as D.D. *Transcript* at 37. As they have consistently demonstrated throughout this case, as well as in P.D.'s case, they are either incapable or unwilling to address their own issues, let alone those of a special needs child. The evidence sufficiently supported the trial court's decision to terminate the Doty's parental rights with respect to D.D.

2.

The Dotys also assert that their due process rights were violated by procedural irregularities in the CHINS proceedings. *See A.P. v. Porter County Office of Family &*

Children, 734 N.E.2d 1107 (Ind. Ct. App. 2000) (procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights), *trans. denied*. In this regard, they claim the OFC failed to provide them with case plans and that the case plans were not workable.

There is no indication in the record that the Dotys raised these alleged due process violations below. "It is well established that we may consider a party's constitutional claim waived when it is raised for the first time on appeal." *Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006). Accordingly, the Dotys' due process arguments are waived on appeal. *See Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175.

Waiver notwithstanding, we remind the Dotys that proof of a case plan is not an element in a termination proceeding. *See In re T.F.*, 743 N.E.2d 766 (Ind. Ct. App. 2001), *trans. denied*. Further, while the record of the CHINS proceedings is not before us to examine the extent to which case plans were prepared and provided to the Dotys, we note that their own statement of the case in their appellate brief indicates that case plans were "documented, communicated and delivered to all parties involved." *Appellants' Brief* at 1. Further, their unsupported argument that the case plan was unworkable because Tina is mentally ill, had no transportation, and never understood the case plan[8] is similarly without merit.

---

[8] The Dotys' assertion that Tina never understood the case plan further indicates she was provided with a case plan.

Judgment affirmed.

NAJAM, J., and DARDEN, J., concur.